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Motion to dismiss Motion for rehearing says P.P.
P.P. for
Durant against
Denied April 6th by the C. J. (opinion, report)

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 587. 360

EDGAR MARIN, ANDRE DUMFORD, AND ROSINA DUMFORD, APPELLANTS,

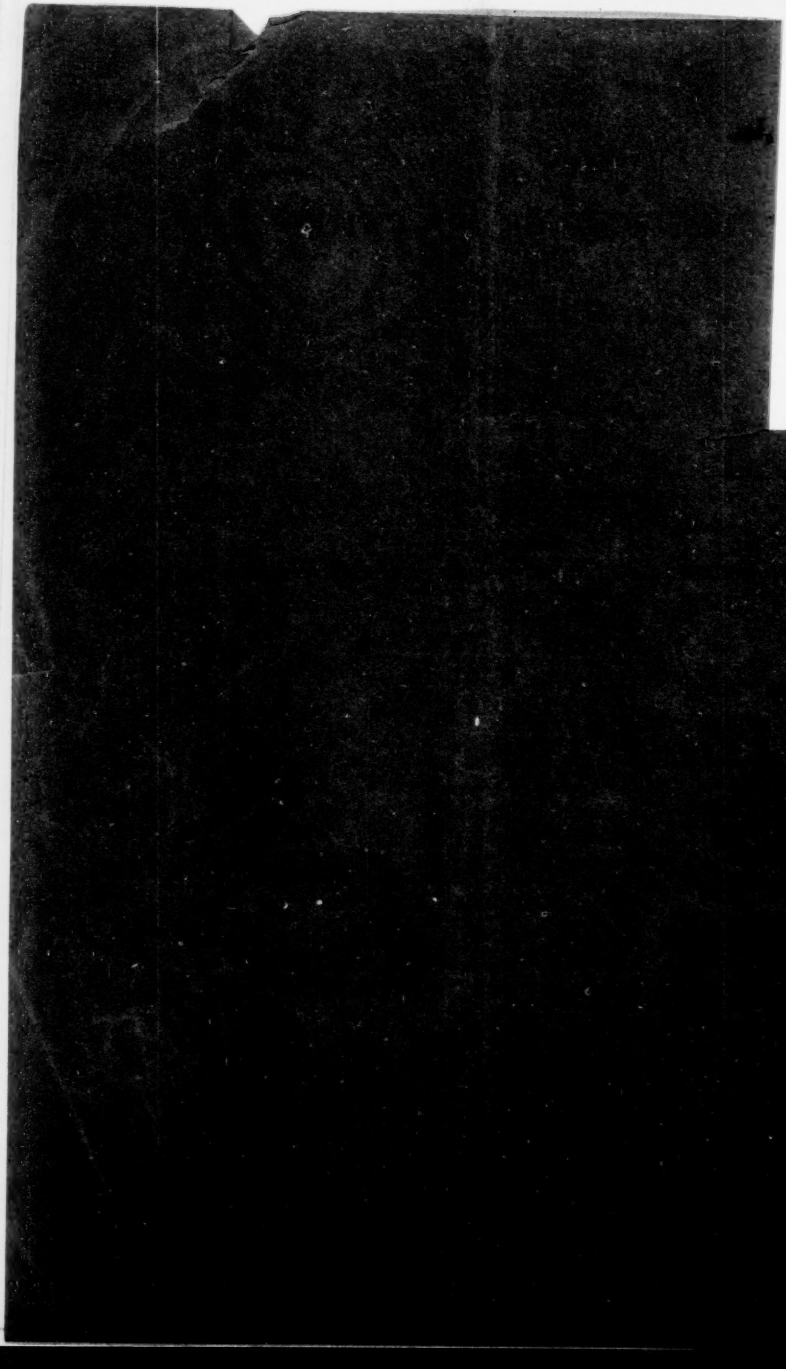
vs.

GEORGE A. LALLEY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

FILED DECEMBER 10, 1872.

Oct 9, 1873



SUPREME COURT OF THE UNITED STATES.

No. 587.

EDGAR MARIN, ANDRE DUMFORD, AND ROSINA DUMFORD, APPELLANTS,

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1 UNITED STATES OF AMERICA:

Circuit court of the United States for the fifth judicial circuit & district of Louisiana.

GEORGE A. LALLY. *vs.* EDGAR MARIN & AL. } No. 6686.

Petition & order.—Filed 28th March, 1872.

To the honorable the judges of the United States circuit court for the fifth judicial circuit & district of Louisiana:

The petition of George A. Lally, who is a citizen of the city of New York, in the State of New York, and resident thereof, respectfully shows: That he is the holder and owner of two (2) several promissory notes, drawn and made at the city of New Orleans, in the State of Louisiana, on the 19th day of February, 1869, by Edgar Marin, André Dumford, and Miss Rosina Dumford; all of them are citizens and residents of the State of Louisiana; each of said promissory notes bind the said makers jointly, severally and in solido, and are each payable to their own order, and by themselves indorsed and made payable to Dymond & Lally,
2 who were a commercial firm, composed of John Dymond and George A. Lally, both of whom are now and were then residents and citizens of the State of New York; that thereupon said Dymond & Lally then indorsed and delivered each of said two notes to petitioner, who is the legal owner and holder of said notes; that each of said notes is made payable on the first day of January, A. D. 1871, after their date; each made payable at the office of The Citizens' Bank of Louisiana, in New Orleans; each for six thousand nine hundred and sixty-three $\frac{12}{100}$, ($6,963.12½), with interest on each at the rate of eight per centum, per annum from maturity, all of which will appear from the original notes herewith filed and hereto annexed and made part of this petition; that the interest has been paid on each of these notes up to January 1st, 1872, & payment extended to that date; that, subject to the payment of said interest, the full amount of said two notes together, amounting to the sum of thirteen thousand nine hundred and twenty-six $\frac{25}{100}$ ($13,926.25) and interest on same from January 1st, 1871, at eight per cent. per annum is still due, owing, and unpaid to petitioner.

3 Your petitioner further shows that payment of said notes, with the interest due thereon and the fees of the att'y employed to collect the same should legal proceedings be necessary to collect same, which fee was fixed at (5%) five per cent. on the amount recovered, was secured by a special mortgage granted by the said makers of the said notes on the following described real estate, viz, a plantation situated in the parish of Plaquemine, in this State, on the right bank of the river Mississippi, at about twenty-eight miles below the city of New Orleans, known as the St. Rosalie plantation, having & measuring twenty-seven arpents more or less, front on said river, by eighty arpents, more or less, in depth, bounded above by lands of William Erskins, and below by lands of White & Truffaut, together with all the buildings and improvements thereon, mules, carts, and all the farming utensils attached and belonging to said plantation, and all the appurtenances thereon, as the whole will appear from a duly-certified copy of an authentic act of mortgage duly ex-
4 ecuted by the said parties, passed before Armand Pitot, jr., notary public, for the parish of Orleans & State of Louisiana, on the

twenty-third day of February A. D. 1869, which is hereto annexed and made part of this petition. Petitioner further shows that said notes were paraphed Ne varietur by the said notary, and by him after having been drawn as aforesaid, with the said authentic act by which they were secured, which will more fully appear from said notes and said act hereinbefore referred to and made part hereof.

That said act has attached to it the renunciation of the wife of said Edgar Marin, Mrs. Marin Celestine Bienvinne, in due form. That said act of mortgage was made before a notary, and in the presence of two witnesses, and imports a confession of judgment.

Wherefore petitioner prays, in consideration of the premises, that a writ of seizure and sale may issue to the marshal, commanding him to seize & sell for cash the property mortgaged as aforesaid, and herein-described, for the payment of the debt due to petitioner, viz, the sum of thirteen thousand nine hundred and twenty-six $\frac{25}{100}$ ($13,926.25) dollars with interest thereon at the rate of eight per cent. per annum from January 1st, 1872, until paid, and five per cent. thereon for atto'ys fees, & that proper legal notice be served by him on said mortgagees, & for all costs of suit & for all equitable relief in the premises.

(Signed) GIVEN CAMPBELL,
Att'y for Petitioner.

Order.

Let executory process issue as prayed for, & according to law.
(Signed) W. B. WOODS, *Judge.*

MARCH 28TH, 1872.

Act of mortgage.—Filed March 28th, 1872.

UNITED STATES OF AMERICA,
State of Louisiana, City of New Orleans:

Be it known that, on this twenty-third day of the month of February, in the year of our Lord one thousand eight hundred & sixty-nine, & of the Independence of the United States of America the ninety-third, before me, Armand Pitot, jr., a notary public, duly commissioned & sworn, in & for this city & the parish of Orleans, therein residing, & in the presence of the witnesses hereinafter named & undersigned, personally appeared, Mr. Edgar Marin, Mr. André Dumford, (unmarried,) & Miss Rosina Dumford, all three of age & residing in the parish of Plaquemines, in this State, owners each in the proportion of one undivided third of the property hereinafter described, who declared that they are justly & truly indebted, jointly & in solido, unto Mess. Dymond & Lally, a commercial firm established in this city, & composed of Mr. John Dymond & Mr. James Lally, in the full sum of nineteen thousand five hundred & fifty dollars, ($19,550.00,) borrowed money, for which they have given, under date of this day, their three notes drawn & subscribed by them, the said Edgar Marin, André Dumford & Miss Rosina Dumford, jointly & in solido, to their own order, & by them endorsed, one for the sum of five thousand six hundred & twenty-three $\frac{75}{100}$ dollars, ($5,623.75,) payable on the first day of January, eighteen hundred & seventy, & the two other notes for the sum of six thousand nine hundred & sixty-three $\frac{125}{100}$ dollars, ($6,963.12½,)

each, both payable on the first of January, eighteen hundred & seventy-one; all bearing interest at the rate of eight per cent. per annum from their respective maturity until final payment, & made payable at the Citizens' Bank of Louisiana, in this city. Which three notes after being paraphed Ne varietur by me, the undersigned notary, in order to identify them with this act, were delivered to Mr. John Dymond herein acting for his said commercial firm of Dymond & Lally, & acknowledging the receipt thereof. And in case it shall become necessary to institute legal proceedings for the recovery of the above described three notes, or of any part thereof, at their maturity, the said Edgar Marin, André Dumford & Miss Rosena Dumford, bind themselves to pay the fees of the attorney at law who may be employed for that purpose, which fees are hereby fixed at five per cent. on the amount sued for.

9 Now, therefore, in order to secure the punctual payment of said three notes at their respective maturity, together with the interest & attorney's fees herein above stipulated, the said mortgagors, Messrs. Edgar Marin & André Dumford & Miss Rosena Dumford, declared that they do by these presents, mortgage, affect & specially hypothecate in favor of the said commercial firm of Dymond & Lally, & to enure to the benefit of all future holder or holders of the above-described three notes, the said Mr. John Dymond being here present & accepting for his said commercial firm of Dymond & Lally, the following described property, which the said Messrs. Edgar Marin & André Dumford & the said Miss Rosena Dumford promise not to sell, alienate, or in any way encumber, to the prejudice of this act, to wit, a plantation situated in the parish of Plaquemines, in this State, on the right bank of the river Mississippi, at about twenty-eight miles below the city of New Orleans, known as the St. Rosalie plantation having & measuring twenty-seven arpents, more or less, front on said river, by eighty arpents, more or less, in depth, bounded above by the lands of William Erskins,

10 & below by lands of White & Truffaut, together with all the buildings & improvements thereon, mules, carts, & all the farming utensils attached, & belonging to said plantation, & all the appurtenances thereon.

By reference to the annexed certificate of the recorder of the parish of Plaquemines, dated the first day of February, eighteen hundred & sixty-nine, it appears that there are no other mortgages resting upon the above-described property than the following, to wit: 1st. The one granted by Thomas M. Dumford, André Dumford, & Miss Rosena Dumford in favor of Edgar Marin, as per act of sale of rights & moveables, passed before Simon Martin, recorder of said parish of Plaquemines, on the 24th day of January, 1867, to secure the full & punctual payment of the sum of nine thousand four hundred dollars (9,400) in two promissory notes drawn by them to their own order, & by them endorsed, dated the 24th day of January, 1867, one for the sum of seven thousand five hundred dollars, & the other for nineteen hundred dollars, both payable at one year from date: recorded in book C, No. 1507, fo. 293 of conventional mortgages. 2nd. The one granted by André Dumford, Miss Rosena Dumford, & Edgar Marin in favor of William Lerilloux,

11 as per act of mortgage before Eusèbe Bouny, notary public in New Orleans, on the 13th day of January, 1869, to secure the full & punctual payment of the sum of thirty thousand dollars, for which the said André Dumford, Rosena Dumford, & Edgar Marin have subscribed & furnished four certain promis'ory notes, dated the 13th of January, 1869, & by them endorsed, each for the like sum of seven thousand

five hundred dollars, payable on the fifteenth day of February, 1870, at the Citizen's Bank of Louisiana, to bear interest at the rate of eight per cent. per annum from maturity until final payment, recorded book C, No. 1628, fo. 398 of conventional mortgages, January 15th A. D. 1869.

And now, to these presents, personally appeared Mr. Joseph Adolphe Boutin, of this city, who declared unto me, notary, that as the last holder of the above-described four promissory notes, each for the sum of seven thousand & five hundred dollars, drawn & subscribed by the said André Dumford, Miss. Rosena Dunford, & Edgar Marin, on the 13th of January, 1869, to their own order & by them endorsed, payable all four at the Citizens' Bank of Louisiana, on the fifteenth day of February, 1870,

12 bearing interest at the rate of eight per cent. per annum from maturity until final payment, secured by mortgage on the property herein above described by said act of 13th of January, 1869, passed before Eusèbe Bouny, notary public in this city, & having received payment in full of said four notes, he does, by these presents, authorize & empower the recorder of mortgages for the parish of Plaquemines to cancel & erase on his books the mortgage securing the above-described four notes. Internal-revenue stamps to the amount of twenty dollars ($20) for duty on this act have been hereto affixed & duly cancelled.

And now, to these presents personally came & appeared Madam Marie Celestine Bienvinu, of age, wife of the said Mr. Edgar Marin, who having taken cognizance of the foregoing act, which I, the notary, carefully read and explained to her, declared & said that she approves and ratifies the same, & further, that it is her wish & intention to release in favor of the said Dymond & Lally, the property herein mo'tgaged from the matrimonial, dotal, paraphernal, & other rights, & from any claims, mortgages or privileges to which she is, or may be entitled, whether by virtue of her marriage with the said Mr. Edgar Marin, or otherwise.

13 Whereupon I, the said notary, did inform the said Mistress Edgar Marin, apart & out of the presence & hearing of her said husband, that she had by law a legal mortgage on the property of her said husband:

1st. For the restitution of her dowry, & for the re-investment of the dotal property sold by her husband, & which she brought in marriage, reckoning from the celebration of the marriage. Secondly. For the restitution & the re-investment of the dotal property by her acquired since marriage, whether by succession or donation, from the day the succession was opened, or the donation perfected. Thirdly. For nuptial presents. Fourthly. For debts by her contracted with her said husband. And fifthly. For the amount of her paraphernal property by her & received by her said husband, or otherwise disposed of for the individual interest of her said husband.

That in making her said intended renunciation she would deprive herself irrevocably & forever, of all rights of reclamation against the property herein above mortgaged, whether under mortgage privilege, or otherwise.

And the said Mistress Edgar Marin did thereupon declare unto

14 me, notary, that she is fully aware of & acquainted with the nature & extent of the matrimonial, dotal, paraphernal, & other rights & privileges, thus secured to her by law on the property of her said husband, & that she nevertheless, did persist in her said intention of renouncing not only all the rights, claims, & privileges hereinbefore enu-

merated & described, but all others, of any nature or kind whatever to which she is, or may be entitled by any laws now or heretofore in force in the State of Louisiana.

And the said Mr. Edgar Marin, being now present, aiding & authorizing the said Mistress Edgar Marin, his wife, in the execution of these presents, she, the said Mistress Edgar Marin, did again declare that she did & does hereby make a formal renunciation & relinquishment of all her said matrimonial, dotal, paraphernal, and other rights, claims, & privileges in favor of the said Dymond & Lally, binding herself & her heirs at all times to sustain & acknowledge the validity of this renunciation.

Done & passed at New Orleans, in my office, the day, month, & year aforesaid, in the presence of Messrs. Gustave Le Gardeur & Edward Pitot, of this city, competent witnesses, who have signed with the appearers & me, notary, after reading the whole.

15 (Original signed) CLESTINE MARIN.
ED. MARIN.
A. DUMFORD.
R. DUMFORD.
J. A. BOUTIN.
JOHN DYMOND for
DYMOND & LALLY.
G. LE GARDEUR.
E. PITOT.
A. PITOT, *Not. Pub.*

A true copy—one word interlined—good, approved.
[SEAL.] (Signed) A. PITOT, JR.,
Not. Pub.

Two notes filed March 28th, 1872.

$6,963.12½.] NEW ORLEANS, *February 19th*, 1869.

On the first day of January, 1871, after date, we, jointly & in-solido, promise to pay to the order of ourselves, at the office of the Citizens' Bank of Louisiana, in New Orleans, six thousand nine hundred & sixty-three $\frac{12\frac{1}{2}}{100}$ dollars, value received, with interest at eight per cent per annum from maturity until paid.

ED. MARIN.
A. DUMFORD.
R. DUMFORD.

(Written across the face:) Ne varietur. In conformity to an act passed before me on this day, duly stamped $7.00.
New Orleans, Feb. 23rd, 1869.
(Signed) A. PITOT, JR.,
Not. Pub.

(Endorsed on back:)

We hereby waive demand, protest, & notice of protest.
(Signed) DYMOND & LALLY,
In liquidation.

Pay Dymond & Lally, or order.

16 ED. MARIN.
A. DUMFORD.
R. DUMFORD.

Pay to the order of Geo. A. Lally.

DYMOND & LALLY.

[* Pay to the order of James McConnell.

GEO. A. LALLY.

Pay Dymond & Edwards, or order.

JAMES McCONNELL.]

Time extended & interest paid to Jan'y 1st, 1872, on within order.

P. pro. DYMOND & EDWARDS.

(Signed) GUS. PITOT.

NEW ORLEANS, *M'ch 28th*, 1871.

$6,963.12½] NEW ORLEANS, *February 19th*, 1869.

On the first of January, 1871, after date, we, jointly & in-solido, promise to pay to the order of ourselves, at the office of the Citizens Bank of Louisiana, in New Orleans, six thousand nine hundred & sixty-three $\frac{12\frac{1}{2}}{100}$ dollars, value received, with interest at eight per cent. per annum from maturity until paid.

ED. MARIN.
A. DUMFORD.
R. DUMFORD.

(Written across the face:) Ne. varietur. In conformity to an act passed before me on this day, duly stamped $7.00.
New Orleans, Feb'y 23rd 1869.
(Signed) A. PITOT, JR.,
Not Pub.

(Endorsed on back:)
We hereby waive, demand, protest, & notice of protest.
DYMOND & LALLY,
In liquidation.

Pay Dymond & Lally, or order.

ED. MARIN.
17 A. DUMFORD.
R. DUMFOBD.

Pay to the order of Geo. A. Lally.

DYMOND & LALLY.

[* Pay to the order of James McConnell.

GEO. A. LALLY.

Pay Dymond & Edwards, or order.

JAMES McCONNELL.]

Time extended & interest paid to Jan'y 1st, 1872, on within note.
N. O., M'ch 28th, 1871.

P. pro. DYMOND & EDWARDS.

(Signed) GUS. PITOT.

* All included between brackets [ ] erased in original.

Writ of seizure and sale.—Issued M'ch 28th, 1872.

NOTA.—Not returned by marshal.
* [Marshal's return thereon. None.]

Petition & order for supersedeas.—Filed April 4th, 1872.

United States circuit court for the 5th circuit & district of Louisiana.

GEO. A. LALLY
vs.
EDGAR MARIN, ANDRÉ DUMFORD, & MISS Rosena Dumford. } No. 6686.

To the Honorable W. B. Woods, judge of said court:

These defendants, by William Grant, their attorney, with re-
18 spect, represent that an ex-parte order or judgment, granting executory process, was rendered against them by this honorable court in said cause, on the 28th day of March, 1872, on the law side of the docket, in and by which a writ of seizure and sale was authorized to be issued against them, directing the marshal for this district to seize & sell a valuable plantation belonging to them, to satisfy a certain alleged debt amounting to $13,936.28, and interest; and that such order or judgment is final. And these defendants now complain & represent that they are aggrieved and injured by said judgment, which contains the following errors to their prejudice:

1st. That said order or judgment was granted ex-parte, without any notice or service of process on these defendants.

2nd. That said order or judgment was rendered sol'y on the proof annexed to and made part of the petition, and on the averments of the petition, without any authentic proof of the signatures of Dymond & Lally, through whom the plaintiff claims title to the note sued on.

3rd. That the petition on which the said order or judgment
19 was granted, does not allege that the endorsement of Dymond & Lally was by authentic act.

4th. That the said judgment or order directs the collection of 5 per cent. attorney's fees, without any proof that the same had been earned, or averment in the petition that the same had been incurred.

5th. That the court, at the time of granting said order or judgment, had no authentic proof before it that Dymond & Lally, the assignors of the notes sued on, were citizens of the State of New York, and that they were entitled to sue in this honorable court on said notes.

6th. That the said order or judgment was not authorized by the laws and rules of practice of the United States, and the court had no jurisdiction in the premises.

7th. That said order or judgment does not decree the amount for which executory process is granted, as it ought to have done, and is contrary to the law and the evidence before the court.

8th. That Mrs. Marie Bienvinne, wife of said Edgar Marin, is alleged to be a party to the act of mortgage *d* ordered to be enforced by
20 said judgment, and she is not made a party to this suit, as she ought to have been.

9th. That the writ issued is not the writ ordered in said judgment, & the judgment does not follow the prayer of the petition.

* All included between brackets [ ] erased in original.

10th. That said order or judgment directs the issuance of executory process without first ordering defendants to pay the demand of plaintiff within the legal delays.

11th. That no notice of the presentation of the petition for executory process was served on defendants prior to the rendition of judgment, as required by the provisions of the code of practice in force in this court, & that they have thus been prevented from making their just defense. And these defendants represent that the debt sued on herein, is amply secured by mortgage, and that they ought not to be required to give security except in an amount sufficient to cover costs & "just damages for delay." Wherefore they pray that they may be granted a writ of error in due form of law, from said judgment or order, for a review of the decision of this honorable court by the Supreme Court of the United States, on giving bond in such sum as may be necessary, to
21 secure the costs and "just damages for delay," to be fixed by the court, and that said writ may be made a supersedeas.

(Signed) WILLIAM GRANT,
Def'ts Att'y for this Motion Only.

Order.

[*A writ of error to operate as a supersedeas is allowed in this case, as prayed for, and according to law returnable to the Supreme Court of the United States, on the 1st Monday of December, 1872, upon petitioner's giving bond in the sum of one thousand dollars with good & solvent security, conditioned as the law directs.

April 4th, 1872.

(Signed) W. B. WOODS, *Judge.*]

Writ of error.—Issued & filed April 4th, 1872.

UNITED STATES OF AMERICA:

The President of the United States to the honorable the judges of the circuit court of the United States in and for the fifth circuit, & holding sessions for the district of Louisiana, greeting:

Because, in the record and proceedings, as also in the rendi-
22 tion of the judgment of a plea which is in the said circuit court, before you, or one of you, between George A. Lally & Edgar Marin, André Dumford, and Miss Rosena Dumford, a manifest error hath happened, to the great damage of the said Edgar Marin, Andre Dumford, and Miss Rosena Dumford, as by their complaint appears:

We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the 1st Monday of December next, in the said Supreme Court, to be then & there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

23 Witness the Honorable Salmon P. Chase, Chief Justice of the

* All included between brackets [ ] erased in original.

said Supreme Court of the United States, this fourth day of April, in the year of our Lord one thousand eight hundred and seventy-two.

[SEAL.] (Signed) T. A. WOOLFLEY,
Clerk of the U. S. Circuit Court for the District of Louisiana.

(Endorsed on the back:) Copy of a writ of error lo'ged in the clerk's office of the circuit court of the United States for the fifth circuit and district of Louisiana, in pursuance of the statute in such cases made and provided, this 4th day of April, one thousand eight hundred and seventy-two.

(Signed) W'M GRANT,
Att'y of Plaintiff in Error.

Bond for writ of error.—Filed April 5th, 1872.

Know all men by these presents that we, Edgar Marin, Andre Dumford, Rosena Dumford, as principal, and Victor Reaud, Antoine Giraud, and Marcel Ducros, as surities, are held and firmly bound unto
24 George A. Lally, in the full and just sum one thousand ($1,000) dollars, to be paid to the said George A. Lally, his certain attorney, executors, administrators; or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals and dated this fifth day of April, in the year of our Lord one thousand eight hundred and seventy-two.

Whereas, lately, at a circuit court of the United States, fifth judicial circuit, holding sessions in and for the district of Louisiana, at the November term thereof, in a suit depending in said circuit court, wherein George A. Lally is plaintiff and Edgar Marin, André Dumford, & Miss Rosena Dumford are defendants, judgment was rendered against the said Edgar Marin, André Dumford, & Miss Rosena Dumford, defendants, and the said Edgar Marin, André Dumford, Miss Rosena Dumford having obtained a writ of error, and filed a copy thereof in the clerk's office of the said circuit court, to reverse the judgment
25 in the aforesaid suit, and a citation directed to the said George A. Lally, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington the first Monday of December next, A. D. 1872:

Now, the condition of the above obligation is such, that if the said Edgar Marin, André Dumford, and Miss Rosena Dumford, shall prosecute their writ to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed)
ED. MARIN. [L. S.]
A. DUMFORD. [L. S.]
R.V. DUMFORD. [L. S.]
V. REAUD. [L. S.]
M. T. DUCROS. [L .S.]
A. GIRAUD. [L. S.]

Sealed and delivered in the presence of—as to M. T. Ducros & A. Giraud—
(Signed)
A. C. STORY.
W'M GRANT.

Approved, April 5th, 1872.
(Signed) E. H. DURELL, *Judge.*

Citation in error.—Issued April 5th, 1872.

THE UNITED STATES OF AMERICA:

Circuit Court of the United States, District of Louisiana.

The President of the United States to Geo. A. Lally, greeting:

26 You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, on the first Monday of December next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States, for the fifth circuit and district of Louisiana, wherein, Edgar Marin, André Dumford, and Miss Rosena Dumford, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said Edgar Marin, André Dumford, and Miss Rosena Dumford, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this fifth day of April, in the year of our Lord, one thousand eight hundred and seventy-two.

(Signed) W. B. WOODS, *Judge.*

Affidavit of W'm Grant. Filed April 11th, 1872.

27 United States circuit court, dist. of La.

GEO. A. LALLY *vs.* EDGAR MARIN ET AL. } No. 6686.

William Grant, being duly sworn, says that from an examination of the record in this cause, and from a conversation had with Given Campbell, esq., attorney for plaintiff, that the only evidence offered, or before the court, on the application made in this case for executing process, was, 1st, the act of mortgage annexed to the petition; and 2nd, the two notes annexed to the said petition.

Affi*davit*, therefore, says that no other or further evidence was before the court at the time the order for executing process was granted therein, on the 28th day of March, 1872, than the mortgage and notes aforesaid.

(Signed) W'M GRANT.

Sworn to before me April 6th, 1872.

(Signed) T. A. WOOLFLEY.
U. S. Comm'r.

28 *Objections and answer of defendants.—Filed April 11th, 1872.*

United States circuit court for the district of Louisiana.

GEO. A. LALLY *vs.* EDGAR MARIN ET ALS. } No. 6686.

Now comes defendants, by W'm Grant, their att'y, and, for objection to and complaint against the order or judgment for executory process

granted in this cause, on the 28th day of March, A. D., 1872, alleges as follows:

1st. That this honorable court is without authority to render any judgment, or sign any order which is in effect a judgment, such as the above, or to authorize the issuance of a writ of seizure and sale, or any writ in the nature of an execution, without first rendering a final judgment, and giving the defendants ten days from the date thereof, in which to take a writ of error therefrom to operate as a supersedeas, in accordance with the statutes of the United States in such case made and provided.

2nd. That the exercise of authority in the premises, by granting said order, the court nullifies the rights granted by statute in favor of
29 every defendant to have an appeal on writ of error from every judgment, or order, or decree in a cause where such judgment, &c., has become fixed & final, and executory, & that its exercise in this case was & is inconsistant with the laws of the United States, and that so far as the same does conflict with the judicial system of the United States, the practice of the State courts is not binding on, and ought not to be exercised in, the courts of the United States.

3rd. That no order or judgment ought to be entered, in any case, in this court, which, in effect, gives the plaintiff a right to execute the same against the property of the defendant, which is not, in its nature, final, within the meaning of the acts of Congress regulating appeals and writs of error.

4th. That if this court shall determine that the practice of the courts of this State regulates, in all respects, the procedure in this cause, then these defendants will be compelled to go out of this case and file a bill on the equity side of the docket of the court, to enjoin and restrain the enforcement of a judgment or order which is so far final as to be executory on the law side of the docket; that the defenses permit-
30 ted in such form of proceeding are limited to a few specified causes, and these defendants will be deprived of their right of defense.

5th. And these defendants allege that said order or judgment for executory process was rendered on insufficient evidence; that the endorsements, through which plaintiff claims to be owner and holder of the notes sued on, are not by authentic act, as the law requires; that the notes and mortgage are not stamped, under the revenue laws of the United States, in order to make them valid evidence in any civil court.

6th. That said order or judgment does not fix the amount for which process is ordered to be issued, and that the order grants no delay, as required by law, before the issuance of a writ of seizure and sale, in which defendants are allowed to pay the demand.

7th. That, for reasons aforesaid, said order or judgment for executory process was

8th. That these defendants have a good defense to this suit, and they deny that they are indebted unto plaintiff, as alleged, and now so answer to the allegation of indebtedness set out in the petition filed herein; and they allege that they have fully paid the demand
31 made in this suit, and that they had so paid the same prior to the institution of this suit.

Wherefore these defendants pray that the order for executory process, granted herein, March 28th, 1872, be annulled and set aside; and that the writ of seizure & sale, issued by virtue thereof, be quashed and set aside, and that their defense may be heard; and that this court may finally pass judgment on their said defense and right to have said

order or judgment annulled, and that the plaintiff's petition may be dismissed at his costs.

(Signed) W'M GRANT,
Att'y for Def'ts.

Motion & order—case fixed—from minutes.—Filed April 11th, 1872.

NEW ORLEANS, *Thursday, April 11th*, 1872.

Court met pursuant to adjournment.

Present, Honorable E. H. Durell, dist. judge.

GEO. A. LALLY
vs.
EDWARD MARIN & AL. } No. 6686.

On motion of W'm Grant, att'y for defendants, ordered, that the cause be set for hearing on the 15th inst., at 11 a. m., and that
32 plaintiff be notified thereof.

Notice of trial and marshal's return.—Filed April 11th, 1872.

Circuit court of the United States for the fifth judicial circuit and district of Louisiana.

GEO. A. LALLY
vs.
EDGAR MARIN & AL. } No. 6686.

You are hereby notified that this case is assigned for trial for Tuesday, the 16th day of April, A. D. 1872, at 11 o'clock a. m.

By order of court.

Witness my hand and seal of the said court, at New Orleans, this 11th day of April, A. D. 1872.

[SEAL.] (Signed) F. B. VINOT, *D'y Clerk.*

To GIVEN CAMPBELL, esq'r'.

Marshal's return.

On the 13th day of same month and year, served a copy of within notice of trial on Given Campbell, *mane*d herein, by leaving the same at his office, 61 Camp street, with Jos. Ficklin, his office man.

New Orleans, April 16th, 1872.

S. W. REED, *D'y U. S. Marshal.*

33 *Judgment.—From minutes of April 16th*, 1872.

Present, Honorable E. H. Durell, dis't judge.

This cause came on for hearing, this 16th day of April, 1872, at the November term of the court, on the opposition and answer of defendants to the order for executory process herein granted on the 28th day of March, 1872, and on the application therein to quash the writ of seizure and sale—

W'm Grant, for defendants; Given Campbell, for plaintiff, not present—

When, after hearing argument of counsel, it is ordered, adjudged, & decreed, that the writ of seizure and sale be quashed as prematurely

issued, that the said opposition be dismissed, and that the said order of March 28th, 1872, be now made final.

Motion and order to reinstate writ of error, &c.

SAME
vs.
SAME

On motion of W'm Grant, attorney for the defendants, it is ordered that the writ of error originally filed herein and set aside by order of this court, on the day of April, 1872, be now reinstated to operate as a supersedeas, and that said order setting aside said writ of error be cancelled and annulled.

34 *Rule.—Minutes, April 18th, 1872.*

Circuit court of the United States, fifth circuit and district of Louisiana, November term, A. D. 1871.

NEW ORLEANS, *Thursday, 18th day of April*, 1872.

Court met pursuant to adjournment.
Present, the Honorable E. H. Durell, district judge.

GEO. A. LALLY
vs.
EDGAR MARIN & ALS. } No. 6686.

On motion of Given Campbell, att'y for Geo. A. Lally, ordered that the defendants do appear in this honorable court and show cause, on Saturday, 20th April, 1872, why the order of the court upon the opposition filed by them in this case, the writ of error entered on the minutes, on the 16th day of April, 1872, should not be cancelled, annulled and set aside, because—

1st. The plaintiff was never notified of trial of said opposition and had no opportunity of being present and asserting his rights.

2nd. Because said order was issued and is contrary to the rules and practice of the court and contrary to law.

3rd. Because the delay for granting a writ of error had expired,
35 & the defendants were not entitled to a writ of error with a supersedeas.

4th. Because the 1st writ of error having been cancelled and erased the same could not be reinstated.

5th. Because the opposition is not according to law.

That William Grant, the attorney of record for defendants, be notified of this motion.

Circuit court of the United States, fifth circuit and district of Louisiana, November term, A. D. 1871.

NEW ORLEANS, *Thursday, 18th day of April*, 1872.

Court met pursuant to adjournment.
Present, the Honorable E. H. Durell, district judge.

GEO. A. LALLEY
vs.
EDGAR MARIN & ALS. } No. 6686.

On motion of Given Campbell, att'y for Geo. A. Lally, ordered that the defendants show cause, on Saturday, 20th instant, at 11 a. m., why

the order of the court upon the opposition filed by them in this case, and the writ of error entered on the minutes, on the 16th instant, should not be cancelled, annulled, and set aside on the grounds filed.

36 CLERK'S OFFICE.

I certify the foregoing to be a true copy from the original record in this office.

Witness my hand and seal of said court, at the city of New Orleans, this 18th day of April, 1872.

[SEAL.] (Signed) T. A. WOOLFLEY, *Clerk.*

Marshal's return, April 19th 1872.

On the same day, month, and year, served a copy of the within rule & grounds on William Grant, by handing the same to him in person in the custom-house building.

April 19th, 1872.

(Signed) CHA'S R. STEELE,
D'y Marshal.

From minutes Saturday, April 20th, 1872.

Present, Honorable E. H. Durell, judge.

By consent of counsel the rule herein returnable this day is continued till the 23rd instant, at 11 a. m.

Hearing & submission of rule.—From minutes, Tuesday, April 23rd, 1872.

Present, Honorable E. H. Durell, judge.

The rule taken by the plaintiff, on 18th instant was called—

37 Given Campbell, for plaintiff; William Grant, for defendants—

When, after hearing argument, the court took time to consider, and requested counsel to furnish briefs.

Order vacating all decrees.—From minutes, May 8th, 1872.

Present, Honorable E. H. Durell, judge.

GEO. A. LALLY
vs. } No. 6686.
EDGAR MARIN ET AL.

Ordered that all decrees herein made subsequent to the last order granted by his honor, the presiding judge, be vacated and rescinded; leaving to the parties their remedy, if they see fit so to do, to file a bill on the equity side of the court, an' apply for an injunction, upon good cause shown.

38 *Motion & order.—Opposition fixed.—From minutes, May 9th,* 1872.

United States circuit court, district of Louisiana.

Present, E. H. Durell, judge.

GEO. A. LALLY
vs. } No.
EDGAR MARIN ET AL.

On motion of W'm Grant, attorney for defendants, the opposition filed herein to the order of seizure and sale is fixed for hearing on the 14th day of May, 1872, at 11 a m.

Notice of trial.

Circuit court of the United States for the fifth judicial circuit and district of Louisiana.

GEO. A. LALLY
vs.
EDGAR MARIN & AL. } No. 6686.

You are hereby notified that the opposition filed herein to the order of seizure and sale in this case is assigned for trial for Tuesday, the 14th day of May, A D. 1872, at 11 a. m. By order of court.

Witness my hand & seal of the said court, at New Orleans, this 9th day of May, A. D. 1872.

[SEAL.]

F. B. VINOT,
D'y Clerk.

To W'M GRANT, esq'r, & GIVEN CAMPBELL, esq'r.

39 *Marshal's return.*

MAY 10*th*, 1872.

On same day, month, and year, served a copy of within notice of trial of exceptions on the within named, in the following manner on W'm Grant, att'y, on the 11th day of month & year, served Given Campbell, named herein, by handing the same to him in person.

New Orleans, May 11th, 1872.

S. W. REED,
D'y U. S. Marshal.

Order: Matter to be submitted to the circuit judge.—From minutes, May 14th, 1872.

GEO. A. LALLY
vs.
EDGAR MARIN ET AL. } No. 6686.

This cause was called on the opposition to the order of seizure and sale—Given Campbell, for plaintiff; W'm Grant, for defendant—when it is ordered that the matter be submitted to his honor, the circuit judge.

40 *Motion & order.—Opposition fixed from May 22nd, 1872.*

U. S. circuit court, district of Louisiana.

GEO. A. LALLY
vs.
EDGAR MARIN ET AL. } No. 6686.

On motion of W'm Grant, attorney for defendants, it is ordered that the opposition filed herein to the order for executory process, be re-assigned for hearing, on Saturday, the 25th day of May, 1872, at 11 o'clock a. m., and that plaintiff's attorney be notified.

Order: Opposition to the order of seizure and sale be dropped from the docket.—Extract from the minutes.

GEO. A. LALLY
vs.
EDGAR MARIN ET AL. } No. 6686.

NEW ORLEANS, *Saturday, May* 25, 1872.

Court met pursuant to adjournment.

Present, Hon. W. B. Woods, presiding judge. The opposition to the order of seizure and sale was called up—W'm Grant, for opponent;
41 Given Campbell, for plaintiff—when, considering that the said opposition has already been disposed of by his honor, Judge Durell, ordered that said opposition be dropped from the docket.

Order: Objections & answers overruled.—Extract from the minutes.

NEW ORLEANS, *Monday, June 3d*, 1872.

Court met pursuant to adjournment.

Present, Hon. W. B. Woods, presiding judge. Present, Hon. E. H. Durell, dist. judge.

GEO. A. LALLY
vs.
EDGAR MARIN ET ALS. } No. 6686.

Ordered that the objections and answers of the defendants to the order of seizure and sale be overruled.

42 *Affidavit of Tho's J. Docker.—Filed June 13th*, 1872.

THO'S J. DOCKER, being duly sworn, deposes and says that he is a planter, residing in the parish of Plaquemines, State of Louisiana; that he is well acquainted with the plantation called St. Rosalie, situate in the parish of Plaquemines aforesaid, & belonging to André Dumford, Rosena Dumford, and Edgar Marin, and that said plantation is fully worth the sum of fifty thousand dollars.

(Signed) TOM. J. DOCKER.

Affirmed to & subscribed before me, on this the 3rd day of April, 1872.

(Signed) WILLIAM M. PRESCOTT,
Parish Judge in and for the Parish of Plaquemines, Louisiana.

Affidavit of Ja's Bostrand.—Filed June 13th, 1872.

JAMES BOSTRAND, being duly sworn, deposes and says that he is a planter, residing in the parish of Plaquemines, State of Louisiana; that he is well acquainted with the plantation called St. Rosalie, situate in the parish of Plaquemines aforesaid, and belonging to André Dumford, Rosena Dumford, & Edgar Marin, and that said plantation is
43 fully worth the sum of fifty thousand dollars.

(Signed) JAMES BOSTRAND.

Sworn to & subscribed before me, on this the 3rd day of April, 1872.

(Signed) WILLIAM PRESCOTT,
Parish Judge in and for the Parish of Plaquemines, Louisiana.

Affidavit of Leon C. Courcelle.—Filed June 13th, 1872.

LEON C. COURCELLE, being duly sworn, deposes and says that he the State tax-collector of the parish of Plaquemines, State of Louisiana; that he is well acquainted with the plantation called St. Rosalie, situate in the parish of Plaquemines aforesaid, and belonging to André Dumford, Rosena Dumford, & Edgar Marin, and that said plantation is fully worth the sum of fifty thousand dollars.

(Signed) LEON C. COURCELLE.

Sworn to & subscribed before me, on this the 3rd day of April, 1872.

(Signed) WILLIAM PRESCOTT,
Parish Judge in and for the parish of Plaquemines, Louisiana.

44 *Affidavit of Jno. L. Huntington.—Filed June 13th, 1872.*

JOHN L. HUNTINGTON, being duly sworn, deposes and says, that he is the deputy sheriff of the parish of Plaquemines, State of Louisiana; that he is well acquainted with the plantation called St. Rosalie, situate in the parish of Plaquemines aforesaid, and belonging to André Dumford, Rosena Dumford, and Edgar Marin, and that said plantation is fully worth the sum of fifty thousand dollars.

(Signed) JOHN L. HUNTINGTON.

Sworn to & subscribed before me, on this the 3rd day of April, 1872.

(Signed) WILLIAM PRESCOTT,
Parish Judge in and for the Parish of Plaquemines, Louisiana.

Certificate of mortgage.—Filed June 13th, 1872.

STATE OF LOUISIANA,
Parish of Plaquemines:

I, Charles V. Thibaut, recorder of mortgages in and for the parish of Plaquemines, State of Louisiana aforesaid, therein residing, duly
45 commissioned and sworn, do hereby certify that, according to the records of mortgages for this parish, up to the date hereof, it appears that there are no other mortgages standing or recorded against the names of Edgar Marin, Rosena Dumford, and André Dumford, on the Rosalie plantation, situated in this parish, and hereinafter described, than the following, to wit:

1st. The one granted by Thomas M. Dumford, André Dumford, & Miss Rosena Dumford, in favor of Edgar Marin, as per act of sale of rights and moveables, passed before Simeon Martin, then recorder of this parish, on the 24th day of January, 1867, to secure the punctual payment of the sum of nine thousand four hundred dollars, ($9,400,) in two promissory notes, drawn by them to their own order, and by them endorsed, dated the 24th day of January, 1867, one for the sum of seven thousand five hundred dollars, and the other for nineteen hundred dollars, both payable at one year from date, specially mortgaged and hypothecated in favor of said Edgar Marin, or any future holder or holders of said notes, the following-described property, to wit, a certain plantation situated in this parish, on the right bank of the
46 Mississippi River, at about twenty-eight miles below the city of New Orleans, having & measuring twenty-seven arpents, more or

less, front on said river, by forty arpents in depth, bounded above by lands of William Erskine, and below by lands of White and Truffant, together with all the buildings and improvements thereon, mules, carts, and all the farming utensils attached and belonging to said plantation. Recorded, parish of Plaquemines, on the 24th day of January, 1867.

N. B. The above-described mortgage was subrogated to the firm of Dymond & Lally, of the city of New Orleans, by act executed before A. Pitot, j'r, notary public, on the 22nd day of February, 1869, which said mortgage is now reduced to the sum of three thousand four hundred & sixty-four $\frac{25}{100}$ dollars.

2d. The one granted by Edgar Marin, Andre Dumford, & Miss Rosena Dumford, in favor of Dymond & Lally, as per act of mortgage, passed before Armand Pitot, j'r, notary public, in the city of New Orleans, on the February, 1869, to secure the full & punctual payment of the sum of nineteen thousand five hundred and fifty dollars, ($19,550.00,) in three several promissory notes, drawn and sub-
47 scribed by them, the said Marin, Andre & Miss Rosena Dumford, jointly & in solido, to their own order, and by them endorsed, one for the sum of five thousand six hundred and twenty-three dollars and seventy-five cents, ($5,625.75,) payable on the first day of January, 1870, and two other notes for the sum of six thousand nine hundred and sixty-three $\frac{12\frac{1}{2}}{100}$ dollars, ($6,963.12½,) each, both payable on the first day of January, 1871, all three bearing interest at the rate of 8 % per annum from maturity until paid, and also to secure all the costs, and attorney's fees in case of legal proceedings being instituted for the recovery of said notes or any part thereof, which attorney's fees are fixed at five per cent. on the amount sued for, specially mortgaged & hypothecated in favor of said firm of Dymond & Lally, or any future holder or holders of said notes, the hereinbefore described property.

N. B. The said above secondly-mentioned mortgage is now reduced to thirteen thousand nine hundred and twenty $\frac{25}{100}$ dollars.

3d. The one granted by Edgar Marin, Andre Dumford, & Miss Rosena Dumford, in favor of Messrs. Blanchin & Giraud, as per act
48 of mortgage executed before Joseph Cuvillier, notary public, in New Orleans, on the 15th April, 1871, to secure the punctual payment of the sum of eleven thousand two hundred and eighty-three $\frac{80}{100}$ dollars, in three promissory notes, drawn by them in solido to their own order, and by them endorsed, bearing interest at 8 % per annum, from maturity till paid, being each for the sum of three thousand seven hundred and sixty-one $\frac{26\frac{2}{3}}{100}$ dollars, dated the 15th of April, 1871, and all three payable on the first day of March, 1872, specially mortgage and hypothecate the herein above-described property.

4th. Edgar Marin, Andre and Rosena Dumford, in favor of the firm of Daniel and James D. Edwards, of the city of New Orleans, as per detailed bill from September 1st, 1871, to December 1st, 1872, with interest thereon for the seven hundred and ninety-eight $\frac{95}{100}$ dollars, for account of the St. Rosalie plantation.

5th. The taxes for the years 1869 & 1870 as per delinquent lists on file and of record in my office.

In faith whereof I hereunto set my hand and affix the seal of my office the 3rd day of April, A. D. 1872.

[SEAL.] (Signed) C. V. THIBAUT,
Recorder.

49 *Recapitulation of mortgages.*

Dymond & Lally, granted January 24th, 1867, for $9,400.00, and now reduced to	$3,464 25
Dymond & Lally, granted Feb'y , 1869, for $19,550.00, & now reduced to	$13,926 25
Blanchin & Giraud, granted April 15th, '71, for the sum of	$11,283 80
D. & J. Edwards, privilege claim, but no mortgage, for	$798 95
Parish taxes of 1869 & 1870	$425 25
	$29,898 50

Value of plantation not less than $50,000.00, cash.

Motion & order for appeal.—Filed June 13th, 1872.

United States circuit court, district of Louisiana.

GEORGE A. LALLY
vs.
EDGAR MARIN, ANDRE DUMFORD, & MISS Rosena Dumford. } No. 6686.

Now, on this 13th day of June, A. D. 1872, in open court, comes the defendants Edgar Marin, Andre Dumford, & Miss Rosena Dum-
50 ford, by their attorneys, and suggesting that there is error to their prejudice in the order for executory process, entered herein on the 28th day of March, 1872, and made final on the 3rd day of June, 1872, by judgment of this honorable court; and that they desire to take an appeal therefrom to the Supreme Court of the United States, to operate as a supersedeas in the cause, upon giving bond to cover costs and all just damages for delay only:

Whereupon, it is ordered by the court that an appeal be granted said defendants, to operate as a supersedeas in the cause, upon defendants giving bond in the sum of one thousand dollars, with good and solvent surety, conditioned as the law directs, to indemnify the plaintiff' against all costs and just damage for delay. It is further ordered that said appeal be returnable in the Supreme Court on the first Monday of December, 1872.

June 13th, 1872.

(Signed) E. H. DURELL, *Judge.*

51 *Bond for appeal.—Filed June 13th, 1872.*

Know all men by these presents that we, Edgar Marin, Andre Dumford, and Miss Rosena Dumford, as principals, and Antoine Giraud, of New Orleans, as surety, are held and firmly bound, jointly and severally, unto George A. Lally, in the sum of one thousand dollars, lawful money of the United States of America, to be paid to the said George A. Lally, heirs, executors, administrators, and assigns; for which payment, well and truly to be made, we bind ourselves, and each of us by himself and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated the thirteenth day of June, in the year of our Lord eighteen hundred and seventy-two.

Whereas the said Edgar Marin, Andre Dumford, and Miss Rosena Dumford, have this day presented a petition to the honorable the circuit court of the United States, for the fifth circuit, holding sessions in and for the district of Louisiana, praying for an appeal from a certain order for executory process, dated March 28th, 1872, and made
52 final June 3rd, 1872, granted and entered in said court in a certain cause therein pending in which George A. Lally is plaintiff, and Edgar Marin, Andre Dumford, and Miss Rosena Dumford, are defendants, No. 6686 in the docket of said court :

Now, the condition of the above obligation is, that we, the above-bounden Edgar Marin, Andre Dumford, & Rosena Dumford, and Antoine Giraud, will well and truly pay to the said George A. Lally, the plaintiff in said suit, all such just damages and costs as he may recover against us, in case it should be decided that the said appeal was wrongfully obtained.

EDGAR MARIN. [L. S.]
ANDRE DUMFORD. [L. S.]
MISS ROSENA DUMFORD, [L. S.]
P. p. W'M GRANT, *Att'y.*
ANT. GIRAUD. [L. S.]

Signed, sealed, and delivered by Antoine Giraud in the presence of—

P. A. DUCROS.

Approved.
(Signed) E. H. DURELL, *Judge.*

53 *Order : Bond approved.—Extract from the minutes of June* 13, 1872.

GEO. A. LALLY
vs.
EDGAR MARIN ET AL. } No. 6686.

Antoine Giraud, having given satisfactory proof of his solvency, was accepted as surety on the appeal bond furnished by defendants.

54 UNITED STATES OF AMERICA,
Circuit Court of the United States,
Fifth Circuit and District of Louisiana :

CLERK'S OFFICE.

I, Francis A. Woolfley, clerk of the circuit court of the United States for fifth circuit and district of Louisiana, do hereby certify that the foregoing 53 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had, together with all the evidence adduced on the trial of the case of George A. Lally vs. Edgar Marin et al., No. 6686 of the docket, so far as the same now remain of record or on file in said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 26th day of October, A. D. 1872.
[SEAL.] F. A. WOOLFLEY, *Clerk.*

I, E. H. Durell, United States judge for the district of Louisiana, do hereby certify that Francis A. Woolfley, whose name is signed to the above certificate as clerk of the circuit court of the United States for

the fifth circuit and district of Louisiana, was, at the time of signing said certificate, and is now, the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 26th day of October, A. D. 1872.

E. H. DURELL, *Judge.*

55 THE UNITED STATES OF AMERICA,
United States Circuit Court,
District of Louisiana:

The President of the United States to George A. Lally, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington, on the first Monday of December next, pursuant to a motion for appeal & order thereon, filed in the clerk's office of the circuit court of the United States for the fifth circuit and district of Louisiana, wherein Edgar Marin, *Rosina* Durnford, and Miss Rosina Durnford are appellants, and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellants, as in said motion mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this 14th day of June, in the year of our Lord one thousand eight hundred and seventy-two.

E. H. DURELL, *Judge.*

56 (Indorsed:) United States circuit court. No. 6686. Geo. A. Lally vs. Edgar Marin & al. Citation of appeal.

Marshal's return.

Received, June 14, 1872, and, on the 15 day of June, 1872, served a copy of within citation of appeal on Given Campbell, esq., att'y for Geo. A. Lally, personally.

New Orleans, June 24, 1872.

S. W. REED,
D'y U. S. Marshal.

On this 24th day of June, 1872, personally appeared before me the subscriber, S. W. Reed, and makes oath that he delivered a true copy of the within citation, as stated in his official return hereon.

S. W. REED,
D'y U. S. Marshal.

Sworn to & subscribed before me.

F. B. VINOT,
U. S. Comm'r.

(Indorsement on cover:) No. 587. Edgar Marin, Andre Dumford & Rosina Dumford, appellants, vs. George A. Lally. Louisiana C. C. U. S. Filed 10th December, 1872.

dw

25 Sawing 1 Chelsea v Delay (Dec 1871)

229 Clyde U.S. Apr 13.

66 U.S. v Lafayette Oct 17. 73.

Supreme Court of the United States.

EDGAR MARIN, ANDREW DUMFORD, ROSINA DUMFORD,
vs.
GEORGE A. LALLY.

No. 587.

Appeal from the Circuit Court of the United States for the District of Louisiana.

BRIEF OF PLAINTIFFS IN ERROR ON MOTION TO DISMISS.

The motion to dismiss is based on two grounds:

First. That the order for executory process is not a final judgment which can be reviewed by writ of error.

Second. That the proceedings being on the law side of the court an appeal does not lie, even if there were a final judgment.

The distinction between ordinary proceedings and summary proceedings—the *via ordinaria* and the *via executiva*—is well known. In Louisiana a mortgage by authentic act, (La. Code of 1825, art. 3,361,) if it contains *a confession of judgment*, can be made executory by the competent judge. This order "*for an immediate seizure of the thing*" is purely a judicial act, and as its effects are summarily to cause the sale of the debtor's property to satisfy the claim made by the plaintiff, the proceedings are always *stricti juris*, and the finality of the decree awarding executory process is of such efficiency as to be a good foundation for an appeal to the court having the requisite appellate jurisdiction. Such a judgment is, in no proper sense of the word,

interlocutory. It is a *final* judgment. (Articles 537, 538, 539, and 565 of the La. Code of Practice; 3 Blackstone's Com., *397.) The parties are, in the eye of the law, in the actual presence of the judge, confessing the judgment. (See La. Code, art. 2,233.) In all confessions of judgment there is necessarily a waiver of the mesne process which brings the defendant into court. If the circuit court assumed jurisdiction and awarded executory process on an illegal confession of judgment, it is submitted that this honorable court has full power to correct the error of the court *a quâ* in the mode provided by law. If there are fatal errors apparent on the face of the record, such, for instance, as the nullity of the judgment, the defendant may rely for a reversal on such error, and cannot be deprived of his appeal by failing to resort to an injunction.

So it has been frequently decided that from all orders of executory process given by courts of original jurisdiction in Louisiana, an appeal will lie to its supreme court, and this appeal may be either suspensive (*supersedeas*) or devolutive, (which does not arrest execution.) "An appeal *must* lie from it, as from all other orders of court that might work an irreparable injury. A judge might, erroneously, make such an order on evidence not warranting the issuing of it."

Harrod *vs.* Voorhies, Adm'x, 16 La. Rep., 254.

And the courts of Louisiana look with so much dislike upon this oppressive mode of procedure, that the order of seizure and sale is reversed for the slightest error in the accuracy of the demand and decree, because the proceeding is *ex parte*.

Cumming *vs.* Archinard, 1 La. Annual R., 279.

Nichols *vs.* Grice, 6 La. Annual R., 446.

"A writ of seizure and sale comes against the property of the debtor like a clap of thunder."

Martin, J., in Grant *vs.* Walden, 6 La. (Miller) R., 635.

And the courts readily presume plaintiff intends to abandon his *via executiva* in order to pursue his remedy *viâ ordinariâ*.

Richard *vs.* Bird, 4 La. (Miller) R., 306.

The *fiat* of the judge in all cases of executory process is the same, and is a matter of form. "Let executory process issue as within prayed for, and according to law."

See Record in this case, on page 2.

The finality of such a decree has never been questioned. Though in form no judgment at all, in substance it decrees a strictly judicial sale of the debtor's immovables on execution by the sheriff, to satisfy the amount confessed in the authentic act, and which is set forth in the petition praying for the process.

Riley *vs.* Christie, 13 La. Annual, 256, quoting Harrod *vs.* Voorhies, 16 La., (Miller,) 256.

The writ of seizure and sale is executed with the same delays and formalities as the *fi. fa.* for the sale of real estate.

Grant *vs.* Walden, 6 La., (Miller,) 630.

Canal Bank *vs.* Copeland, 8 La., (Miller,) 581.

Pepper *vs.* Dunlap, 16 La., (Miller,) 171.

Nor is the order for executory process to issue in any true sense a judgment *nisi*, unless every judgment entered on a judgment-note, bond with warrant of attorney, or *cognovit*, be such a judgment. Such confessed judgments may be opened at the discretion of the court in banc, on an application to the equitable powers of the judges, and no writ

of error lies from this exercise of their discretion. But from the original judgment entered on the confession a writ of error lies as a matter of course.

Knox *vs.* Flack, 10 Harris, (Penn.,) 337.

Hutchinson *vs.* Ledlie, 12 Casey, (Penn.,) 112.

And this necessarily brings us to the exact language of our adversaries in their motion to dismiss, for they take two grounds: *first*, denying the finality of the judgment appealed from, and *second*, even if there be a final judgment, claiming that the proceedings being on the law side of the court an *appeal* does not lie.

But a reference to the record discloses that this suit is, both in form and substance, for the foreclosure of a mortgage given to pay certain promissory notes, which are accurately set forth in the petition. (Record, pp. 1, 2.) Under the well-settled jurisdiction of this court, this suit is, then, a suit in equity, no matter by what name it may be called; and if this honorable court has any appellate jurisdiction whatever over this case, which we think cannot be correctly denied, this jurisdiction cannot be exercised on a writ of error. The only mode of relief is by appeal.

Walker *vs.* Dreville, 12 Wall., 440.

And we submit that to retain jurisdiction and decide this case on its merits, "as the justice of it may require," would certainly be to conform the practice, pleadings, forms, and modes of proceeding of the circuit court of the United States for Louisiana to those of the State courts of Louisiana, "as near as may be," agreeably to the language and spirit of the act of 1st June, 1872. (17 S. L., 197.)

The only authority upon which the appellee relies for a dismissal of the appeal is the case of Levy *vs.* Fitzpatrick, (15 Peters, 167.) But the present case may be readily distinguished, for it has been brought up by appeal, and not by

writ of error; and has only been taken after an ineffectual effort to open the judgment, set aside the writ, and let the defendant in the court below into a defence. In Levy *vs.* Fitzpatrick, the writ of error was taken within ten days of the order, and without the slightest attempt to obtain relief from the court below. It is not a binding authority in this case for anything more than that a proceeding by seizure and sale, under Louisiana law, is so far a suit in equity that it cannot be removed to the United States Supreme Court on a writ of error; and this point is expressly relied upon by the appellant here.

We conclude—

First. That a decree of a United States circuit court in Louisiana, ordering a writ of seizure and sale to issue, is a judgment rendered on the confession of the defendant.

Second. That such a judgment is so far final as to warrant a writ of error or an appeal therefrom, for the correction of errors of law or of fact apparent on the record.

Third. That an appeal is the proper remedy for the review of such a judgment, when rendered by a circuit court of the United States in Louisiana.

We pray your Honors to sustain the jurisdiction, and refuse to dismiss.

Respectfully submitted.

THOMAS J. DURANT,
for Appellant.

Supreme Court of the United States.

MARIN *et al*
v.
LALLY.
No. 587.

Brief of P. PHILLIPS.

For rehearing.

I believe it to be due to the Court as well as to my client that I should ask a reconsideration of the question involved in the motion to dismiss.

The case is this—Lally the holder of two promissory notes, secured by mortgage, filed his petition before Judge Woods for executory process.

On the same day the judge ordered "Let executory process issue as prayed for and according to law," and on the very same day, the writ of seizure issued.

By the civil code this mortgage imports a confession of judgment for the amount shown to be due by the notes—and the mortgage is the incident to that indebtedness, and by way of privilege secures it.

If this can be considered a suit or other judicial proceeding, it is one on the *law side* of the court. The Circuit Court in Louisiana, like all the other Circuit Courts, holds its equity and common law jurisdiction as

governed by distinct and well defined principles. It is evident however that the proceeding described is not a suit, and the order of the judge is not a judgment from which a writ of error would lie as well settled in the case of Levy v. Fitzpatrick, and this is impliedly admitted in the opinion I now seek to have reconsidered.

The proceeding is wholly *ex parte*, no notice whatever is given of the application for execution. The party never knows of it until the marshal appears with the writ of seizure, and then notifies him that unless the amount is paid in so many days he will sell the property described in the mortgage.

In the State Court, where there is no distinction between law and equity, the debtor may at any time before the sale, apply to the court that issued the order of seizure for an *injunction*, on a sworn petition alleging one of the eight grounds described in article 739 in the code of practice, and on this opposition the court is to pronounce summarily.

Under the State Practice an appeal lies in all cases where they may be an irreparable injury—It lies therefore from an *order*, as well as a final judgment.

In cases like this, the appeal to the Supreme Court of Louisiana only authorizes the court to enquire whether the judge who issued the order had *sufficient evidence of the note and mortgage* to justify his *fiat*. Dodd v. Crane, 6 Rob., 60.

But no such application for revision could be made to this court, because there must be a final judgment to invoke its appellate jurisdiction.

This court has now distinguished this case from that of Levy v. Fitzpatrick, because of the rejection of the application made by the debtor to set aside the writ of

seizure. It is supposed that this formed a litigation between parties and thus became an ordinary case, so that the determination of the judge could be treated as a judgment.

The record shows that a *writ of error* from the order of the seizure had been prayed for and allowed. This was set aside and then reinstated to operate as a supersedeas p. 13.

On the 8th May, 1872, Judge Durell vacated all decrees made subsequent to Judge Woods' order, for the writ of seizure, with leave to the parties to file a bill on the *equity side of the court* for an injunction. p. 14.

On 26th May, Judge Wood ordered that the opposition be dropped from the docket, and on the 3d June, he ordered that the objections and answers of the defendants to the *order of seizure and sale* be overruled, p. 16.

For the purposes of this case we may assume that the determination of the opposition is subject to the revisory power of this court. The question I now propose to invite your special attention to is, by what means is your jurisdiction to be invoked ?

The case, or controversy, is on the law side of the Circuit Court. If a case, it is in its very nature, one *at law*. It asks merely for execution on a confession of judgment, based on promissory notes. No principles of equity can possibly be involved in the question, whether an execution shall issue. The principles of equity jurisprudence, as already stated, are the same in the Louisiana Circuit as in all the others. To hold that this is an equity proceeding, overturns the practice and jurisdiction that has prevailed in Louisiana, since the origin of the government. If in equity, it must be filed on the equity side of the court, and then the whole code of equity and equity practice controls it.

The counsel for the appellant in the court below never for a moment supposed he was proceeding in equity.

I ask attention to his objections and answer at p. 11. He denies the jurisdiction of the court in such cases—at all— (a question once argued by me and on which this court was equally divided.)

In his fourth point, he says—" If this court shall determine that the practice of the courts of this State, regulates in all respects the procedure in this cause, then these defendants will be compelled to go out of this case, and file a bill on the equity side of the docket of the court to enjoin and restrain the enforcement of a judgment or order which is so far final as to be executory on the *law* side of the docket," &c.

It was then as well understood by the appellant as it was by the appellee and the court, that whatever the proceeding then pending was, it was on the law side of the court.

In dismissing the opposition the judge reserved the right of appellant to file his bill for injunction on the equity side of the court. This was in as close accord with the State practice, as the organization of the Federal Courts would permit. Surely no bill for injunction could be filed on the law side of the Circuit Court.

Whether such proceedings are at all sustainable in the Federal Courts is the serious question on which this court as already stated was divided. But we are now assuming that the jurisdiction exists and are endeavoring to reconcile the adoption of the State practice with the jurisdiction of the Federal Tribunals.

The appellant does not avail himself of the right to file his bill for injunction. He objects to do this on the ground that the defense " in such form of proceeding is

limited to a few specified causes, and thus he will be deprived of his right of defense."

That is, he seeks to demand greater scope of defense than the law of the State permits. This cannot be allowed; the effect and obligation of the confession of judgment must be held to be the same in all the courts held in the State.

Keeping steadily in view that such a mortgage imports a confession of judgment, the defences of the party are strictly limited and confined by the code to the following. (C. P. Art. 739.)

1. That he has paid the debt.
2. That it has been remitted by the creditor.
3. That it has been extinguished.
4. That time has been granted for payment.
5. That the act of mortgage is forged.
6. That it was obtained by unlawful means.
7. That it has a liquidated demand by way of compensation.
8. That the debt is barred by prescription.

Not only are the defenses limited, but no delay is allowed; the truth of the allegation must be *summarily* proved and disposed of. (741.)

It is very evident, that when relief is sought in the Federal Court, the injunction can only be obtained by filing a bill on the equity side of the Court. If the party fails to resort to this remedy, but contents himself with making his opposition to the seizure issued from the law side of the Court, then if he is entitled to review the determination of that opposition, it can only be done by *writ of error*.

The opinion considers this, a bill filed to foreclose a mortgage; we respectfully submit that this is not so. It is a mere proceeding by which the party having a judgment, asks the Court to issue an execution. The fact that by agreement of the parties a particular property is set apart to satisfy that execution does not alter the character of the application.

The case relied on to support this opinion, (Walker v. Dreville, 12 Wall, 441,) is a wholly different case. That was the case of a note secured by an *ordinary mortgage*, such as exists at common law, made to secure the payment of a promissory note. The prayer was that the parties be cited to appear, and that such proceedings be had as should condemn the mortgagor to the payment of the amount found due, and the mortgage premises be decreed to be sold for the payment of the debt, concluding with prayer for general relief.

To this there was an answer, and a cross bill setting up usury and a cross demand.

On this, there was a decree, establishing the debt with privilege on the property described in the mortgage.

The case was brought here on writ of error—which was dismissed.

Mr. Justice Miller, in delivering the opinion of the majority of the Court held, that this proceeding was the "precise mode of foreclosing mortgages in many of the States under their codes, and in all of them, where there is a separate chancery docket, such proceedings are classed among chancery cases."

He therefore held that in such a case the appellate power could only be exercised by means of an *appeal*—(Swayne and Bradley, J. J., dissented.)

It cannot be necessary to point out the difference between that case and the present, where the only request made by the applicant to the Court, is not to render judgment, but solely to issue execution on a judgment already confessed. If such an application does not fall within the chancery jurisdiction, no subsequent objection or answer of defendant can change its character.

We insist that the case cited is authority for the motion made in this case, as the pivotal point of the decision is that "the distinctions between law and equity, must be preserved in the Federal Courts, and that equity causes coming from the Louisiana Circuit must come here by appeal, and common law causes, by *writ of error*."

The prayer for the appeal in this case, suggests that there is "error in the *order for executory process*, entered on 28th March, 1872," and that the parties desire to take an appeal from *that order*, to operate as a supersedeas. This is the appeal that was allowed by the Court. p. 19.

To sustain the appeal the Court must hold, that an order for execution on a confession of judgment is a final decree in a chancery cause.

8 *April*, 1873. P. PHILLIPS.